SUPREME COURT, U. S.

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1088

JAMES J. LAUGHLIN and
ALLAN U. FORTE, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

A. USE OF ILLEGAL WIRETAP EVIDENCE BEFORE GRAND JURY

The Government does not dispute that the Grand Jury received, considered, and relied upon illegal wiretap evidence in returning the conspiracy and corruption indictment against petitioners. In this regard, the Government itself has asserted that the Exclusionary Rule bars use by prosecutors of illegally-seized evidence:

> ". . . Commencing with *Weeks v. United States*, 232 U.S. 383, and continuing to the present day, the method by which the Court has enforced constitutional restraints on law-enforcement officials has been the rule of exclusion – denying to the prosecuting authority the benefits of improperly obtained evi-

> dence. . . ." Brief for the United States in Opposition, *Battaglia v. United States*, No. 867, O.T. 1967, p. 14.

Petitioners assert that, consistent with this principle, the Government should not be entitled to secure an indictment based upon the presentation of illegal wiretap evidence to the grand jury.

It should be noted that application of the Exclusionary Rule to grand jury proceedings does not require "barring the prosecution altogether," as the Government claims. Brief for the United States, p. 6. A grand jury can consider reindicting petitioners – but *not* on the basis of the illegal wiretap evidence.

The Government's reliance on the *Costello* doctrine – involving the use of hearsay evidence, not illegal wiretap evidence – results in a "harmless error" rule contrary to *Chapman v. California*, 386 U.S. 18 (1967); and *Fahy v. Connecticut*, 375 U.S. 85 (1963). *Chapman* confirmed that one cannot treat,

> ". . . as harmless those constitutional errors that 'affect substantial rights' of a party. An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot, under *Fahy*, be conceived of as harmless. . . ." 386 U.S. at pp. 23-24.

Under the *Chapman* standard, one cannot disregard the impact of the use of illegal evidence upon the grand jury merely because *other* legal evidence might have been presented to the grand jury.

B. DEFENDANTS' STANDING TO EXCLUDE COERCED INCRIMINATING TESTIMONY OF A WITNESS

This Court recently acknowledged that, in light of recent decisions, there is a sound basis to review the "standing" doctrine of *Wong Sun v. United States*, 371 U.S. 471 (1962), relied upon by the Government here. In a decision released on March 18, 1968, the Court stated:

> "It has been suggested that the adoption of a 'police-deterrent' rationale for the exclusionary rule, see *Linkletter v. Walker*, 381 U.S. 618, logically dictates that a defendant should be able to object to the admission against him of *any* unconstitutionally seized evidence. See Comment, Standing To Object to an Unreasonable Search and Seizure, 34 U.Chi.L. Rev. 342 (1967); Note, Standing to Object to an Unlawful Search and Seizure, 1965 Wash.U.L.Q. 488. However, that argument is not advanced in this case, and we do not consider it." *Simmons v. United States*, __ U.S. __ (1968).

The instant Petition, of course, raises that very issue.

Moreover, the significance of the standing question raised in this Petition is underscored by the Court's recent grant of certiorari in *Mancusi v. DeForte*, No. 844, certiorari granted, January 23, 1968, where the primary issue is the appropriate criteria of standing to raise constitutional issues. *Mancusi* involved standing to raise Fourth Amendment rights against unlawful search and seizure; this identical question arises here in the context of Fifth Amendment rights against

coerced confessions. Certiorari should be granted to consider this important question.

Respectfully submitted,

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